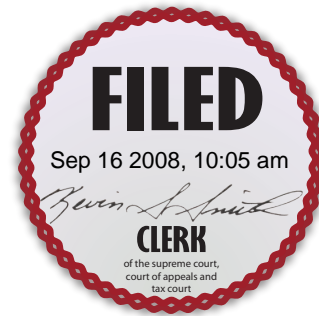


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES COLLIER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0802-CR-104

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Sheila Carlisle, Judge

Cause No. 49G03-0710-FB-206957

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

James Collier appeals his convictions for carrying a handgun without a license, as a class A misdemeanor,¹ and three counts of class B felony robbery;² and his aggregate sentence of thirty years.³

We affirm.

ISSUES

1. Whether the evidence was sufficient to support Collier's convictions.
2. Whether Collier's convictions for class B felony robbery and carrying a handgun without a license constitute double jeopardy.
3. Whether Collier's sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

On September 30, 2007, Danasha Hooks was working as a cashier at the Double 8 Foods store, located at 46th Street and College Avenue in Indianapolis. Also working that night were the manager, Darryl Kirk, and an unarmed security guard, Louis Winn.

At approximately 10:55 p.m., five minutes prior to the store's closing, two black males walked into the store. One man was "tall" and one was "short." (Tr. 15). Both were wearing "[a]ll black" clothing and dark sunglasses. (Tr. 16). The tall man wore a "hoodie" and a red and black hat. (Tr. 17). After entering the store, the men walked to the back.

¹ Ind. Code §§ 35-47-2-1; 35-47-2-23.

² I.C. § 35-42-5-1.

³ Collier does not challenge his conviction or sentence for resisting law enforcement.

Once all of the customers left the store, the two men walked to the front of the store. One brought some grocery items to Hooks' cash register, and the other walked to the front entrance, near where Kirk was standing. After Hooks totaled the cost of the items, the man standing near her register "went in his pocket and brought out a gun." (Tr. 24). At about the same time, the other man "pull[ed] his gun as well." (Tr. 60). The men told the employees to get on the ground, which they did. Hooks thought she "was gonna [sic] die." (Tr. 37). The man standing near Hooks threatened to shoot Winn if he raised his head.

One of the men then ordered Kirk into the front office. Both of the men followed him into the office and had him open two drawers containing cash, including rolls of coins; the men took the money from the drawers.

The men also ordered Kirk to give them the money from one of the cash registers. One of the men hit him on the head "[t]wo or three times" because he "wasn't gettin' [sic] it open fast enough[.]" (Tr. 78). Eventually, the drawer opened and the men took the money from the cash register.

At some point, one of the men ordered Kirk back into the office, where Kirk opened the store's "'trip drawer[.]'" The "trip" or "hold up" was a drawer that triggered a silent alarm when opened. (Tr. 76). It contained money, which had been photocopied and wrapped in bands. The bands had been stamped with "the number 2" as well as the store's previous name—Seven Eleven Supermarkets—and bank account number. (Tr. 204). Kirk gave the man the money from the "trip drawer."

One of the men then forced Winn and Hooks to the back of the store. The other man stayed in the front of the store with Kirk and ordered him to open the store's safe. When Kirk responded that he did not have access to the safe, the man asked, "'do you want me to shoot you?'" (Tr. 80). His accomplice then told him to "'[g]o on and shoot him, go on and shoot him . . . shoot him one time . . . shoot him in his leg. He'll open it up. He'll open it up . . .'" (Tr. 100-01). The man holding Kirk at gunpoint then "shot the safe two or three times" in an attempt to open it. (Tr. 81). When the safe would not open, Kirk offered the man his own money, which the man took.

The men had all three employees walk to the storage room, located in the back of the store. One of the men "went in [Winn's] pockets and took his wallet." (Tr. 32). The men then had Hooks unlock the back door and told the employees to "run back to the front" of the store, which they did. (Tr. 33). Hooks saw the men exit the back door and run through an alley.

Indianapolis Metropolitan Police Officer David Siefker responded to a report of "a hold up alarm" at the Double 8 Foods store. (Tr. 112). After receiving a report that the suspects left from the back of the store, he drove his police vehicle to 44th Street, where he "saw a vehicle coming south on Carrollton, which is the next street over from College." (Tr. 113). He observed the vehicle, which was a red sports utility vehicle, "roll through" the stop sign at 44th Street. (Tr. 117). He followed the vehicle, which "turned southbound onto Guilford again without stopping at the [s]top [s]ign, or without signaling to turn." (Tr. 117). He then activated his emergency lights to initiate a traffic stop. "[T]he vehicle slowed down and both of the passenger's side doors[] came open

and . . . two black male subjects in all dark clothing . . . jumped out of the car and ran between the houses towards the alley between . . . Guilford and Carrollton.” (Tr. 117).

Officer Siefker chased the individuals and called for back up units and a canine officer to assist in apprehending the subjects. Shortly thereafter, he lost track of the individuals.

Subsequently, someone informed Officer Siefker of a gun in the street. Officer Siefker collected “a 9 millimeter Beretta handgun,” which he found next to the sidewalk on Guilford Avenue. (Tr. 124). “There was a magazine containing live rounds in the weapon, and there was also a live round in the chamber” of the gun. (Tr. 128).

Soon thereafter, the canine officer “apprehended a subject about five houses south of [Officer Siefker’s] location” (Tr. 131-32). The location was “almost directly across the alley from the location where [Officer Siefker] initially made the traffic stop and seen [sic] the two individuals running.” (Tr. 132-33). The canine officer’s dog had located the subject under a backyard deck.

Officer Siefker took custody of the individual, who later was identified as Collier. Upon taking custody of Collier, Officer Siefker searched him for weapons. He observed “a very large bulge” in Collier’s pant’s pocket and “could see that there was a large number of U.S. currency, or a large number of bills in this pocket.” (Tr. 134).

An officer subsequently transported Collier to the police station, where Officer Siefker discovered “a bank band that’s used to wrap the money by banks” in Collier’s pocket, as well as “a sleeve that wraps nickels.” (Tr. 137; 138). Collier had “in excess of Five Hundred Seventy Dollars (\$570)” on his person. (Tr. 219). That same night,

officers transported Hooks to the police station, where she identified Collier as one of the men who had robbed the store.

Officer James Albin responded to Officer Siefker's call for assistance. Officer Albin observed a vehicle, matching the description of the one from which the two subjects fled, proceeding south on Carrollton Avenue, approximately one block from Officer Albin's position. As he approached the vehicle, it "slowly rolled and made contact with a parked vehicle that was parked facing south bound on the west side of the street." (Tr. 166). At that point, Officer Albin initiated "a felony traffic stop," during which three officers drew their weapons and gave "verbal commands for anybody inside the vehicle to show . . . their hands" (Tr. 166). After several minutes passed, the officers "approached the vehicle and realized at that point that the vehicle was empty." (Tr. 167).

Officer Siefker, who was on duty as an evidence technician, processed the sports utility vehicle. There, he found a pair of sunglasses in the back seat; a roll of coins on the floorboards of the driver's side; and a red baseball hat on the floorboards of the front passenger's side.

Officer Siefker also processed the inside of the store. There, he collected a "9 millimeter shell casing" near one of the cash registers. (Tr. 145).

Bradford Cross, Vice-President of Double 8 Foods, maintained the photocopies of the money kept in the "hold-up" drawer. Using serial numbers from the photocopied money, he identified the money found on Collier's person as the money taken from the

store's "hold-up drawer." Cross also identified the stamp on the money bands as the one used by the store.

On October 1, 2007, Donald Lewis, who lived in a house across the alley from where the police dog discovered Collier, discovered a wallet in his backyard. The wallet contained Winn's driver's license.

On October 3, 2007, the State charged Collier with Counts I through III: class B felony robbery; Count IV: resisting law enforcement, as a class A misdemeanor; and Part 1 of Count V: carrying a handgun without a license, as a class A misdemeanor. Subsequently, the State filed an amended information against Collier, enhancing the carrying a handgun without a license charge to a class C felony due to a previous felony conviction for theft.

The trial court held a jury trial on December 13, 2007. The jury found Collier guilty of all counts. Collier, however, waived his right to a trial by jury for the class C felony enhancement on the carrying a handgun without a license conviction. On January 4, 2008, the trial court found him not guilty on the class C felony enhancement.

Also on January 4, 2008, the trial court held a sentencing hearing. According to Collier's pre-sentence investigation report ("PSI"), he had two juvenile adjudications: one in 1999 for what would constitute class A misdemeanor battery if committed by an adult; and one in 2001 for what would constitute class B misdemeanor battery if committed by an adult. Collier failed formal probation both times. The PSI further showed a conviction for possession of cocaine, which was entered as a class A

misdemeanor pursuant to Indiana Code section 35-50-2-7(b), in August of 2006;⁴ a conviction for class A misdemeanor criminal trespass on March 19, 2007; and convictions for class D felony attempted fraud and class D felony receiving stolen property on March 30, 2007, for which he received 550 days probation. According to the PSI, the State had filed a notice of probation violation on August 9, 2007. Additionally, Collier had had his probation for his possession of cocaine conviction revoked on March 30, 2007.

The trial court found Collier's prior criminal history and the fact that he was on probation when he committed the current offense to be aggravating circumstances. The trial court also found as an aggravating circumstance "the fact that there were multiple victims." (Tr. 310). As a mitigating circumstance, the trial court found that incarceration would impose a hardship on Collier's young child.

Finding that the aggravators outweighed the mitigator, the trial court sentenced Collier to consecutive sentences of ten years each on Counts I through III; and sentences of one year each on Counts IV and V, to run concurrently with each other and Counts I through III. The trial court further ordered ten years suspended, with five years to be served on probation. Thus, Collier received a total executed sentence of twenty years.

Additional facts will be provided as necessary.

DECISION

1. Sufficiency of the Evidence

⁴ Indiana Code section 35-50-2-7(b) provides, in pertinent part, that "if a person has committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly."

Collier asserts that the evidence is insufficient to support his convictions. Specifically, he argues that because “the identification of [him] by the eyewitnesses is either missing or, in the case of Hooks, somewhat uncertain,” there is “reasonable doubt as to whether . . . Collier was either of the men involved in the robbery.” Collier’s Br. at 16.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted).

Neither Kirk nor Winn could identify the men who had robbed the store. Hooks testified that she had identified Collier at the police station, and that of the two individuals who robbed the store, he was “[t]he short one.” (Tr. 30). She, however, admitted that two days prior to the trial, she informed Collier’s counsel “that the tall guy in the store . . . was the guy that [she] identified . . . at the police station.” (Tr. 47). She then testified that the man she had identified at the police station “was tall.” (Tr. 48). She further testified that she had not seen Collier since the night of the robbery. Later, however, she admitted that she had seen the short man in the store since the night of the

robbery. Upon further examination, she testified that she was absolutely certain that Collier was one of the men who had robbed the store.

“It is well-established that ‘the uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal.’” *Scott v. State*, 871 N.E.2d 341, 343 (Ind. Ct. App. 2007) (quoting *Toney v. State*, 715 N.E.2d 367, 369 (Ind. 1999)). Furthermore, even “equivocal identification testimony is sufficient to support a conviction.” *Scott*, 871 N.E.2d at 343.

However, when identification is the only evidence, the identification must be unequivocal. *Id.* at 344.

This interpretation is in accord with the “incredible dubiousity” rule, under which we will impinge upon the trier of fact’s responsibility to weigh the evidence only “where a sole witness presents inherently contradictory testimony which is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant’s guilt.”

Id. at 344-45 (quoting *Tillman v. State*, 642 N.E.2d 221, 223 (Ind. 1994)). This does not mean, however, that equivocal testimony cannot contribute to a finding of guilt beyond a reasonable doubt. *Id.* at 345.

In this case, Hooks presented contradictory testimony regarding whether Collier was the taller or shorter suspect. She, however, unequivocally identified Collier as one of the men who had robbed the store. We cannot say that her testimony was inherently dubious or inherently improbable. Collier’s counsel cross-examined her, and the jury was able to independently evaluate her testimony. Thus, Collier’s argument is nothing more than an invitation to judge Hooks’ credibility, which we decline to do.

Furthermore, the State presented evidence that Collier was apprehended shortly after the robbery near the area where the robbery took place and near the area where Winn's discarded wallet was found. Collier also had on his person money identified as that taken from the store. Thus, there was circumstantial evidence of Collier's guilt.

Collier is asking this Court to reweigh the evidence and judge Hooks' credibility, which we will not do. The evidence presented at trial is sufficient to support his conviction.

2. Double Jeopardy

Collier asserts that his convictions for class B felony robbery and carrying a handgun without a license violate Indiana's prohibition against double jeopardy. He contends that there was a reasonable probability that the jury used the same evidence to convict him of both offenses as "[o]nly evidence of a single handgun was presented at trial and the only time either of the two men inside the store was alleged to have possessed a gun was during the robbery." Collier's Br. at 11.

Under Article 1, Section 14 of the Indiana Constitution, "two offenses are the 'same offense' in violation of the Indiana Double Jeopardy Clause if, 'with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.'" *Spivey v. State*, 761 N.E.2d 831, 832 (Ind. 2002) (quoting *Richardson v. State*, 717 N.E.2d 32, 49 (Ind.1999)). When challenging convictions under the actual evidence test, "a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential

elements of one offense may also have been used to establish the essential elements of a second challenged offense.’” *Id.* (quoting *Richardson*, 717 N.E.2d at 53).

Regarding the offense of class B felony robbery, the State was required to prove that Collier took property “from another person or from the presence of another person . . . while armed with a deadly weapon,” namely a handgun.⁵ Regarding the offense of carrying a handgun without a license, the State was required to prove that Collier carried a handgun in a vehicle or on his person, except in his dwelling, on his property, or fixed place of business. I.C. § 35-42-5-1. It was Collier’s burden to establish that he possessed a valid license to carry the handgun. *See Harris v. State*, 716 N.E.2d 406, 411 (Ind. 1999) (“[O]nce the State proves that the defendant carried a handgun on or about his person, away from his dwelling or business, the burden shifts to the defendant to establish that he possessed a valid license.”).

The record reflects that Collier and his accomplice entered the Double 8 Foods store while carrying a handgun. They then robbed the store and its employees while armed with a handgun before fleeing the store, taking the handgun with them. Officers later discovered a 9-millimeter handgun discarded in the street near where Collier exited a vehicle. This evidence demonstrates that Collier carried a handgun in a place that was neither his dwelling, fixed place of business nor on his property. Collier, however, did not introduce evidence that he had a license to carry the handgun.

⁵ The offense of robbery is also a class B felony if it “results in bodily injury to any person other than a defendant” I.C. § 35-42-5-1. “‘Bodily injury’ means any impairment of physical condition, including physical pain.” I.C. § 35-41-1-4. Although Kirk testified that he was hit on the head during the robbery, the State only alleged that Collier committed robbery while armed with a deadly weapon.

Given the evidence, we cannot say that Collier demonstrated a reasonable probability that the jury established the essential elements of class B felony robbery and carrying a handgun without a license with the same evidentiary facts. *See Thy Ho v. State*, 725 N.E.2d 988, 993 (Ind. Ct. App. 2000) (finding “distinct evidentiary facts were used to prove that Ho committed robbery while armed with a handgun, while a lack of evidentiary facts was used to prove that Ho did not have a license to carry that handgun”); *see also Mickens v. State*, 742 N.E.2d 927, 931 (Ind. 2001) (finding no double jeopardy violation for the convictions of murder and carrying a handgun without a license because “[c]arrying the gun along the street was one crime and using it was another”). We therefore find no violation of Indiana’s prohibition against double jeopardy.

3. Inappropriate Sentence

Collier asserts that his aggregate sentence of thirty years is inappropriate. He argues that an appropriate sentence “would be the advisory of ten years served concurrently.” Collier’s Br. at 14.

We may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). It is the defendant’s burden to “persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review.” *Anglemyer v. State*, 868 N.E.2d 482, 494 (Ind. 2007) (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007)).

In determining whether a sentence is inappropriate, the advisory sentence “is the starting point the Legislature has selected as an appropriate sentence for the crime

committed.” *Childress*, 848 N.E.2d at 1081. In this case, the trial court sentenced Collier to three consecutive advisory sentences of ten years on the robbery counts. *See* I.C. § 35-50-2-5.⁶ The trial court ordered that ten years be suspended, with five of those years to be served on probation. Thus, including his concurrent one-year sentences on the class A misdemeanor convictions, Collier received an executed sentence of twenty years.

Regarding the nature of the offense, the record reflects that during the course of the robbery, one of the men threatened to shoot Winn, and Hooks believed she was going to be killed. One man encouraged the other to shoot Kirk when Kirk could not open the store’s safe. The other man then discharged his weapon near where Kirk stood. One of the men also hit Kirk on the head several times.

Regarding his character, the PSI shows that Collier, while only twenty-one years of age, has criminal convictions dating back to 2001, including convictions for battery, possession of cocaine, criminal trespass, receiving stolen property and attempted fraud. Furthermore, Collier was on probation at the time he committed the current offense, and a notice of probation violation, filed on August 9, 2007, was pending when he committed the offense. He also has previously had his probation revoked. Accordingly, prior attempts to rehabilitate Collier and deter him from future unlawful conduct have failed.

⁶ Indiana’s new advisory sentencing scheme, which went into effect on April 25, 2005, applies in this case. Pursuant to Indiana Code section 35-50-2-5, “[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.”

Moreover, Collier's PSI reveals a long history of arrests. Charges against Collier included battery, resisting law enforcement, gambling, attempted theft, rape, criminal deviate conduct, criminal confinement, and sexual battery.

[A] record of arrest, particularly a lengthy one, may reveal that a defendant has not been deterred even after having been subject to the police authority of the State. Such information may be relevant to the trial court's assessment of the defendant's character in terms of the risk that he will commit another crime.

Cotto v. State, 829 N.E.2d 520, 526 (Ind. 2005) (citations omitted). Based on the above, we conclude that the sentence imposed by the trial court was not inappropriate.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.